140-703

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~580.~~ 298 32

THE UNITED STATES, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED FEBRUARY 26, 1887.

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1 In the second judicial district court of Montana Territory, sitting at the city of Deer Lodge, county of Deer Lodge, as a court for the trial and determination of causes arising under the Constitution and laws of the United States.

UNITED STATES, PLAINTIFF,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, DEFENDANT.

Amended complaint.

To the honorable the judge of the second judicial district court of Montana Territory, sitting as a court for the trial and determination of causes arising under the Constitution and laws of the United States.

The plaintiff in the above-entitled cause, leave for that purpose first having been obtained of the court by their attorney, Robert B. Smith, bring this, their amended complaint, against the Northern Pacific Railroad Company, a corporation duly organized and chartered, under and by virtue of an act of Congress of the United States, passed on the second (2) day of July, A. D. 1864, and approved by the President on the twelfth
2 (12th) day of July, A. D. 1864, and of the acts and resolutions amendatory thereof, and complaining of the said defendant, the Northern Pacific Railroad Company, by Robert B. Smith, their attorney, upon the information and belief of said attorney, allege:

1. That by the act of Congress above referred to the defendant, the Northern Pacific Railroad Company, became, at the dates hereinafter mentioned, was, and now is, a tenant in common with these plaintiffs in the unsurveyed non-mineral lands lying along the line of the Northern Pacific Railroad Company, where the same passes through the counties of Deer Lodge and Missoula, in the Territory of Montana, and, that the only interest in, or title to the said lands which the said defendant had at the dates hereinafter mentioned, and now has, was granted to and is now held by it under and by virtue of the said act of Congress passed on the said second (2nd) day of July, A. D. 1864, and by which the defendant corporation was duly chartered.

3 2. That during the years A. D. 1883, 1884, and 1885, the defendant, the Northern Pacific Railroad Company, at divers and sundry times during each of said years, by its agents, servants, and employés, sub-tenants, and lessees, entered upon the public unsurveyed lands belonging to these plaintiffs and the defendant as tenants in common, as aforesaid, and which said lands then were, and still are, unsurveyed non-mineral lands, and are situated between McCarthy's Bridge, over the Hell Gate River, in the county of Deer Lodge, in the Territory of Montana, and the line between the Territory of Idaho, and are on each side of the line of the said Northern Pacific Railroad Company, where the same passes through said counties for a distance not exceeding twenty (20) miles on each side of the line of said railroad, and did cut thereon and take and carry away a large quantity of timber, as hereinafter more particularly set forth; that most of the said timber was taken from lands lying in Hell Gate Cañon, and near to the stations of Bonita, Wallace, Turat, Eddy, Thompson's Falls, Noxon, Heron, and Weeksville, and at other points

along the line of said railroad in said counties, and all within
4 the said second judicial district, and within the jurisdiction of this court, a more full, particular, and definite description of said lands it is impossible for these plaintiffs to give or state.

3. That the defendant, during the said years hereinbefore named, did cut on the said land, and take and carry away and manufacture into lumber, 45,100,000 feet of pine trees and other kinds of timber and much more, and did cut and carry away from said lands more than 84,744 railroad ties which were not needed nor used in the construction of the railroad of the said defendant; and did also cut and use 15,400,000 shingles and 32,035 cords of wood and 20,000 cedar posts, and much more; that all of said timber was used, sold, and converted to the use of the defendant, and that said lumber and timber manufactured into lumber, the quantities of which are above stated and set forth, were reasonably worth, at the time when the same was so sold, used, and converted to the use of the defendant,
$20.00 per 1,000 feet, board measure, amounting, in the aggregate,
5 to $910,000.00, and that the said shingles so cut and used were also reasonably worth $3.00 per 1,000, amounting to the sum of $46,-200.00; that the said cord-wood was reasonably worth $2.00 per cord; and the said railroad-ties were reasonably worth forty (40) cents each; and the said cedar posts were reasonably worth $80.00 per 1,000. That the exact quantities of timber cut, manufactured, and taken away from the said unsurveyed lands belonging to plaintiffs and the defendant, as tenants in common as aforesaid, are unknown to the plaintiff or their attorney. That the defendant has received from the stumpage of timber cut on the said unsurveyed lands held by the plaintiffs and the defendant, as tenants in common as aforesaid, by persons other than the defendant, to wit, from the sub-tenants of the defendant, and from Earnest M. Trask and from Watson & Lavelle, a sum amounting in the aggregate to $100,000.00, or thereabouts. That the defendant has received from the sources hereinbefore stated and set forth as the proceeds and profits of the timber growing, standing, and being upon the said lands held by the plaintiffs
6 and the defendant, as tenants in common as aforesaid, and hereinbefore described, the sum of $1,100,000.00, or thereabouts, and that the said sum was received, used, and appropriated by the defendant to its own use, and was greatly in excess of the just share of the defendant of the rents, issues, and profits of the said lands and the timber thereon so held and owned by these plaintiffs and defendant as tenants in common as aforesaid; and that all of the proceeds and profits arising from the said common property were received by the said defendant, and that said defendant was not and is not entitled to receive the whole of said proceeds and profits or to retain the same.

IV. That the defendant has never accounted to these plaintiffs for the said proceeds and profits, or any part thereof, derived from the sale of said timber, or from the said stumpage received from the timber cut from the said unsurveyed lands or in any other manner derived from said common property.

V. That the defendant has cut out and wasted the timber upon
7 said unsurveyed lands held by these plaintiffs and the said defendant as tenants in common as aforesaid, for three years last past, and is still cutting, wasting, and destroying the said property held in common, and is threatening to still cut, waste, and destroy the timber growing on

the above-mentioned lands, despoiling common property and the inheritance therein, and that an action or different actions at law will not protect the rights or interests of the plaintiffs. That said waste is almost continual, and that there is no adequate remedy at law to protect the rights of the plaintiffs.

VI. That these plaintiffs have not sufficient knowledge or information to set forth and establish the liability of the defendant clearly and distinctly as to the quantities of timber cut, used, and converted by the defendant on the unsurveyed lands hereinbefore mentioned and described held by these plaintiffs and the defendant as tenants in common as aforesaid, nor as to the prices or sums of money received by the defendant for the said timber so cut, used, or converted by the defendant to
8 their own use, and that the defendant alone can show and establish the quantities of said timber so cut, used, or converted, and the values thereof, and the prices received therefor.

That the defendant knows the exact quantities of the several kinds of lumber and timber taken from the said unsurveyed lands held by these plaintiffs and the defendant as tenants in common as aforesaid, and the values thereof, and the prices received therefor, and that the plaintiffs are unable to make full and complete proof thereof, except by the defendant.

To the end, therefore, that the plaintiffs' rights in the premises may be fully, fairly, and properly protected, and that the plaintiffs may recover the moneys that may be justly due to them from the defendant, and that the defendant may be compelled to make a true, just, and perfect accounting for all the lumber and timber cut upon the unsurveyed lands held by the plaintiffs and the defendant as tenants in common as aforesaid, and that it may be compelled to pay therefor, the United States, the plaintiff herein, through their said attorney, Robert B. Smith, do respectfully pray:

9 First. That the order and injunction of this court heretofore granted and issued in this cause upon the original petition filed herein may be continued in force against the said defendant corporation, the Northern Pacific Railroad Company.

Second. That an account may be taken by and under the direction of this court of and for all moneys or other things of value and of all profits of every and any kind and description which were derived directly or indirectly by said defendant from timber cut, or the proceeds thereof, from the said unsurveyed lands hereinbefore mentioned, held by these plaintiffs, and the said defendant corporation as tenants in common and for this purpose, that the said defendant be required to appear before this court, or any master in chancery appointed for that purpose, and make a full, clear, and explicit accounting of all moneys or other things of value, and of all of said profits of any kind or description arising from or derived directly or indirectly by said defendant from timber cut, or the pro-
10 ceeds thereof, on the said unsurveyed lands held by these plaintiffs and said defendant as tenants in common as aforesaid, and to show and to exhibit to these plaintiffs the quantities of the said timber and the values thereof.

Third. That the defendant be required to pay to these plaintiffs the sum of one million one hundred thousand ($1,100,000.00) dollars charged herein to be due to the plaintiffs from the defendant corporation, or to pay

such sum or sums as may be found to be due to the plaintiffs from the defendant upon a true, just, and fair accounting as aforesaid, and that the judgment or decree of this court be rendered against the defendant for such sum or sums of money as may be found due from the defendant to these plaintiffs.

Fourth. That when this cause shall finally be tried, heard, and determined that this court enter a decree herein, perpetually prohibiting, restraining, and enjoining the said defendant corporation, its agents, servants, and employés from cutting or removing any timber from the
11 said unsurveyed lands held by these plaintiffs and said defendant, as tenants in common as aforesaid, and from injuring and wasting or despoiling the same.

Fifth. And finally, that this court grant such further orders and decrees, render such judgments, and grant such further and other relief herein, as may in equity seem necessary and proper to fully restore to the United States their just dues from the defendant for the timber so taken, used, and appropriated as above set forth.

And now having fully set forth their grievance, the plaintiffs will ever pray that justice may be done to all parties herein.

ROBERT B. SMITH,
United States Attorney for the District of Montana.

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

Robert B. Smith makes oath and says that he is the attorney for the United States in the district of Montana Territory, and that he drafted the foregoing amended complaint and knows the contents thereof,
12 and that to the best of his information, knowledge, and belief, he swears the facts therein alleged are true.

ROBERT B. SMITH.

Subscribed and sworn to before me this 13th day of May, A. D. 1886.

F. C. WEBSTER,
Notary Public, Montana Territory.

Filed May 13, 1886.

R. L. DAVIS, *Clerk.*

Demurrer to amended complaint.

In the second judicial district court of Montana Territory, sitting at the city of Deer Lodge, county of Deer Lodge, as a court for the trial and determination of causes arising under the Constitution and laws of the United States.

UNITED STATES
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

Demurrer.

13 Now comes the said defendant, the Northern Pacific Railroad Company, and demurs to the amended complaint of the said plaintiff, and for cause of such demurrer, says:

1st. That said amended complaint does not state facts sufficient to con-

stitute a cause of action, in this, that the ownership of said lands is not such a tenancy in common as authorizes the plaintiff to maintain an action for an accounting between the United States and this defendant.

2nd. And in this, that as to the said tenancy in common, the plaintiff can terminate the same by the survey of the said lands, wherefrom it would appear whether any timber has been cut on lands which belong to the said plaintiff.

3. That the said relation, as it exists by virtue of said act of Congress, is continued by the said plaintiff by its neglect to survey the said lands in violation of its contract and duty to the said defendant.

4. And in this, that it does not appear from the said amended
14 complaint that the said plaintiff has ever made any demand on the defendant for its share, or alleged share, of the proceeds arising out of the timber cut on the lands mentioned in said amended complaint.

5. Wherefore, it is not entitled in equity to maintain its bill for an accounting.

Second. That the said complaint is ambiguous, uncertain, and unintelligable, in this:

a. That it does not appear from said amended complaint whether the said timber was cut upon odd or even sections, or that any timber has been cut from the even sections of said land or any land which does not belong to this defendant.

b. And in this, that it does not appear that such a tenancy in common exists as authorizes one co-tenant to call upon another for an accounting for the rents, issues, and profits received from the premises.

c. That the said lands are not sufficiently described to inform this defendant for what particular cutting of timber it is sought to hold it responsible to enable it to make a defense or to be a bar to further suits therefor.

15 *d.* The said complaint is uncertain and unintelligable in that it does not state that the said timber alleged to have been cut by this defendant, as the same stood on the lands mentioned, was of any value whatever.

e. It is uncertain and unintelligable in that it assumes to set forth the value of said timber after the same was taken away and manufactured into lumber, and not what it was worth before the value thereof was enhanced or created by the labor of the said defendant.

f. It does not appear therefrom what was the estate so held and owned by the plaintiff and the defendant as tenants in common, and therefore it does not appear that the said defendant has received anything in excess of its just share of the rents, issues, and profits of the said entire estate.

g. It does not appear in what way or manner the defendant is wasting the said timber.

16 *h.* It does not appear that the said timber is being cut or destroyed in any other way or manner than according to the right of a co-tenant owning such an estate as it alleges belongs to the said defendant and plaintiff.

i. It does not appear from the said amended complaint that this defendant has cut, carried away, or converted any timber except from the lands which by the act of Congress mentioned in the said amended complaint

belong to it, and therefore it is not liable for any of the timber so cut by the said defendant.

j. It appears that a portion of said timber was cut by lessee and sub-tenants of defendant, and does not show what portion thereof, or that defendant is liable therefor.

k. There is a non-joinder of defendants in that the lessees and sub-tenants of defendant became, according to the allegations of the complaint, tenants in common with plaintiff.

Wherefore, it prays if it shall further answer said amended complaint.

SANDERS, HAPTON, TOOLE, DIXON, COLE & WHITEHILL,
Attorneys for Defendant.

17 The undersigned, counsel for defendant in the above-entitled action, hereby certify that, in their opinion, the foregoing demurrer is well founded in point of law.

E. W. & J. K. TOOLE & WM. WALLACE, Jr.,
THOMAS L. NAPTON,
COLE & WHITEHILL,
W. W. DIXON,
Counsel for Def't.

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

Wilbur F. Sanders, being duly sworn, says that he is the attorney and agent of the Northern Pacific Railroad Company, the defendant in the above-entitled action, and that the foregoing demurrer to the amended complaint in said action is not interposed for delay.

W. F. SANDERS.

Subscribed & sworn to before me this 27th day of May, A. D. 1886.
R. L. DAVIS, *Clerk.*

Filed May 27th, 1886.

R. L. DAVIS, *Clerk.*

18 *Order sustaining demurrer.*

Title of cause ———; title of court.

This cause having been heretofore, on the second day of June, 1886, heard on the demurrer of the defendant to the amended complaint of plaintiff herein and by the court taken under advisement, and the court having fully considered said matter, and being advised in the premises, is of the opinion that said demurrer ought to be, and the same is hereby, sustained; to which ruling plaintiffs, by their counsel, except.

And plaintiff declining to further amend its said amended complaint, and electing to abide by the order sustaining said demurrer and to appeal from said order, it is considered and adjudged by the court, being advised in the premises, that this action be dismissed, and that defendant have and recover of plaintiffs their costs of this action, and that judgment be entered therefor.

19 *Judgment.*

Title of cause ———; title of court.

This action came regularly on for hearing on the second day of June, A. D. 1886, upon the demurrer of the defendant to the amended complaint of plaintiff on file herein, Hon. Robert B. Smith, United States attorney, appearing as counsel for the plaintiff, and Messrs. Sanders, Cullen & Sanders, E. W. & J. K. Toole and William Wallace, Jr., Thomas L. Napton, F. W. Cole, H. R. Whitehill, and W. W. Dixon appearing for the defendant; and the court having heard the arguments of counsel and taken the same under advisement and fully considered the matter, afterwards, on the fourth day of June, A. D. 1886, the court announced its opinion that said demurrer ought to be, and the same was accordingly, sustained, to which ruling of the court the plaintiff, by its counsel, then and there excepted. And plaintiff declining to further amend its said amended complaint, and electing to abide by the order sustaining said demurrer and to appeal therefrom, it is considered and adjudged by the court, being fully advised in the premises, that this action be dis-
20 missed, and that defendant have and recover of and from the plaintiff its costs in this behalf expended, and that judgment be entered therefor.

It is therefore ordered, adjudged, and decreed that the defendant, The Northern Pacific Railroad Company, have and recover of and from the United States, plaintiff, the sum of four & $\frac{95}{100}$ dollars, being the amount of costs and disbursements by said defendant incurred in this action.

Judgment entered June 4th, 1886.

Attest:

R. L. DAVIS, *Clerk.*

Notice of appeal.

Title of cause ———; title of court.

To the Northern Pacific Railroad Company, defendant in the above-entitled cause, and to Messrs. Sanders, Cullen & Sanders, E. W. & J. K. Toole and William Wallace, jr., W. W. Dixon, Sharpe & Napton, and Cole & Whitehill, attorneys for the defendant:

You are hereby notified that the plaintiff in the above cause has ap-
pealed from the judgment of the court below in sustaining the de-
21 murrer of the defendant to the amended complaint of plaintiffs and dismissing said action and rendering judgment thereon for defendant and against the plaintiffs for costs therein, amounting to $4.95, and from the whole of said judgment so rendered in the district court at the May term, 1886, and on the 4th day of June, 1886, the plaintiffs appeal to the supreme court of the Territory.

ROBERT B. SMITH,
U. S. Att'y for Montana.

Endorsed: "Service of a copy of the foregoing notice is hereby waived, and service is accepted as complete this August 19th, 1886.

"E. W. & J. K. TOOLE,
"W. W. DIXON,
"SHARPE & NAPTON,
"SANDERS, CULLEN & SANDERS,
"Att'ys for Def't."

Filed Aug. 19, 1886.

R. L. DAVIS, *Clerk.*

22 UNITED STATES OF AMERICA, TERRITORY OF MONTANA,
Second Judicial District, County of Deer Lodge, ss:

I, Reuben L. Davis, clerk of the district court of the second judicial district of said Territory, do hereby certify that the foregoing transcript, on pages numbered 1 to 21, inclusive, contains a full, true, and correct copy of the amended complaint, demurrer to amended complaint, order sustaining said demurrer, judgment, and notice of appeal, in a certain action there pending in the above-named court (sitting as a court for the trial and determination of causes arising under the Constitution and laws of the United States), wherein the United States was plaintiff and The Northern Pacific Railroad Company was defendant, as therein set forth, as the same appear on file and of record in my office.

Attest my hand and the seal of said court this first day of September, A. D. 1886.

R. L. DAVIS,
Clerk.

[Seal of 2nd U. S. Dist. Ct. M. T.]

Filed Dec. 17, 1886.

J. R. ALDEN,
Cl'k Supreme Court.

23 In the supreme court of Montana Territory, January term thereof, 1887.

THE UNITED STATES, PLAINTIFFS & APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY,
defendant & respondent.

Be it remembered, that in the present term of January, in the year of our Lord one thousand eight hundred and eighty-seven, the above-entitled action was brought into the supreme court of Montana Territory, by virtue of an appeal from the order and judgment of the court below, sustaining the demurrer to the plaintiffs' amended complaint herein; and on the call of the docket, the same was assigned for argument on January 11th, 1887, at 10 o'clock a. m.

And on the said 11th day of January, 1887, said cause came on to be heard before the court, on the transcript of the record of the court below in said cause, filed herein, and was argued by counsel for the respective parties, and submitted to the court.

24 And afterwards, to wit, on the 18th day of January, 1887, said cause came on for the decision and judgment of this court on appeal, whereupon the court delivered its opinion and decision in writing, of which, in words and figures, the following is a copy, to wit:

In the supreme court of Montana Territory, January term, 1887.

THE UNITED STATES, PLAINTIFF & APPELLANT,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY,
defendent & respondant.

Appeal from second jud. dist., Deer Lodge County.

Robt. B. Smith, U. S. atty., for appellant; W. F. Sanders, for respondent.

WADE, chief-justice, delivered the opinion:

This is an action instituted by the United States, the appellant, against the Northern Pacific Railroad Company, the respondent, for an accounting, and to recover the sum of one million and one hundred thousand
25 dollars for certain timber, logs, and lumber, which, the appellant alleges, were cut, taken, converted, and carried away by the respondent during the years 1883, 1884, and 1885, from certain non-mineral unsurveyed lands belonging to the appellant and respondent, as tenants in common, situate in the Territory of Montana, between the western line of said Territory and McCarthy's bridge, over the Hell Gate River, in Deer Lodge County, and on either side of the line of the railroad of the respondent, and not more than than twenty miles distant therefrom; and for a perpetual injunction enjoining the respondent from cutting or removing timber from said unsurveyed lands held by the appellant and respondent as such tenants in common; and from injuring, wasting, or disposing of the same.

The court below sustained a demurrer to the complaint, and the appellant, abiding the same, judgment was rendered for the respondent, from which the plaintiff appeals to this court.

The foundation of appellant's action rests upon the proposition, first
26 that the United States and the Northern Pacific Railroad Company are tenants in common of the lands upon which the trees and timber in question are alleged to have been taken; and, second, that an accounting, as between such tenants in common, is a proper remedy.

1. Whether the relation of tenants in common exists between these parties depends upon the provisions of the act of Congress, which gave to the respondent company life and the rights and relations thereupon arising.

The charter of the Northern Pacific Railroad Company is not only a law, but is also a contract, binding alike upon both parties, and giving to each certain rights and imposing upon each certain obligations, which rights thereby become vested, and which obligations can not be escaped or avoided. There was ample consideration for this charter and contract. The railroad in contemplation was of national importance. The purpose of the Government in entering into this contract and in granting this char-

ter was to promote the public interest and welfare, by causing this road to be constructed, thereby to secure to the Government at all times
27 the use and benefits of the same for postal, military, and other purposes. (Charter, sec. 20.)

But Congress recognized the fact, at that time (1864) patent to all the world, that a railroad and telegraph line from Lake Superior to Puget's Sound by the northern route could not be built through the then uninhabited regions between these points by mere private enterprise, and hence the "act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route." The purpose of thia act, as its title clearly indicates, was to aid in the construction of the road in consideration of the benefits which the Government would derive by such construction, as the provisions in its various sections clearly indicate. The scope and extent of the grant, the amount of aid which the Government for this purpose saw proper to contribute to this enterprise, is found in section third of the act incorporating the company, wherein it is provided: That there be, and hereby is, granted to the Northern Pacific Railroad Company, its
28 successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead set-
29 tlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, but not more than ten miles beyond the limits of said alternate sections.

The words "That there be, and hereby is, granted" are words of present grant, and take effect at the date of the act of Congress. A grant of lands by the Government is equivalent to a deed in fee. In the case of the Northern Pacific Railroad Company vs. Majors (5 Mont., 145), after a review of the authorities, in deciding upon the effect and meaning of these words, and of the act incorporating the Northern Pacific Railroad Company, this court said: "Our conclusion, therefore, both upon reason and authority, is that the title of the respondent (The Northern Pacific Railroad Company) took effect at the date of the approval of the act of Congress; that the location of the route and the survey of the lands gave precision to the title, and caused it to attach to the particular section, as of the date
30 of the approval of the act, as fully as if such particular section had been designated in the act; that the character of the title is that

of a grant upon condition subsequent; and that office of the patent is to confirm the title as certain designated portions of the road are completed and reported upon by the commissioners, and render it absolute and unconditional."

The location of the definite route of the road and the survey of the lands anchored the grant, and attached it to its proper subject-matter. But before the definite location and survey, and by the location of the general route of the road, by operation of law, by a provision of the act itself, the lands embraced within the limits of the grant, both as to the odd and even sections, both as to that granted to the company and as to that retained by the Government, were withdrawn from sale, entry, or pre-emption, and as to that granted to the company, this withdrawal continued both before and after survey, and as to that retained by the Government until after survey.

31 Section six of the act provides: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act, but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company, and the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale." The latest expression of the Supreme Court of the United States upon the subject of this grant

32 to the Northern Pacific Railroad Company, and when the same became operative, are found in the case of Buttz vs. The N. P. R. R. Co., decided at the October term of that court, 1886, in which it is declared that, "At the time the act of July 2d, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company."

In the same case it is further held that "when the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company which in aid of the construction of the road it is granted."

Nearly one year previous to this decision, the supreme court of Montana, in the case of The Northern Pacific R. R. Co. vs. Lilly (6 Mont.,

33), had said, in speaking of the effect and operation of section six: "This section is itself a grant and a legislative reservation and withdrawal of the lands granted from sale or pre-emption except by the company." * * "This land is reserved from sale by Congress. It is a legislative reservation, and takes effect whenever the general route of the

road is fixed; and thereafter no person could acquire any right or interest in the land reserved from sale except by act of the company, the grantee of the Government."

Thus, as to the alternate sections within the limits of the grant designated by odd numbers, the title passes from the Government to the company. But as to the lands within the limits of the grant, reserved by the Government, being the alternate sections designated by even numbers, they can not be offered for sale until they are surveyed. The provisions of section six are that the reserved sections can not be sold, and are not subject to the operation of the homestead or pre-emption laws until they are surveyed.

This, then, was the condition of the title to the lands upon which
34 the logs and timber in question were cut. The general and definite route of the road had been fixed; indeed the road had been constructed and was in operation through and over the lands. The land was unsurveyed. The Government was the owner of the reserved even sections, but could not sell them, and the company was the owner of the odd sections, and such sections were not subject to sale except by the company, but the respective sections had not been surveyed and thereby designated.

Did this condition of title create a tenancy in common in these lands as between the Government and the company? Each as to the other was the owner of the alternate sections, and all that remained to be done was to have the sections renumbered. The Government owned no interests in the lands that had been granted to the company, and the company owned no interest in the lands reserved by the Government. As between these parties there was no undivided joint ownership in these lands. The interest of the company was a several, separate interest, and so was that
35 of the Government. Neither could acquire any interest in the whole under a grant of a part. Neither could acquire a joint interest in all the sections by a several and separate grant to, or reservation of, the alternate sections to each.

The company owned the entire interest in every tree or stick of timber on the lands conveyed to and embraced within its grant, and the Government had the same interest in the lands reserved to itself. Neither the Government or the company could sell their lands, and neither could demand partition, for neither owned any undivided interest in the lands of the other. The grant to the company had already partitioned the lands granted, and it only required a survey, an extension of lines, to show the section boundaries, and this survey the Government had promised to make as fast as required in the construction of the road.

What are the incidents of a tenancy in common in lands? There must be a joint, undivided interest in the entire tract.

36 In the case of Ross et al. vs. McJunkin et al. (14 Serg. & Rawle, 364) land warrants had been issued to John and William Menough; to John for three hundred acres, and to William for two hundred acres, which had been surveyed together, and a general diagram of survey returned, which contained no division line, nor anything to distinguish the one tract from the other. The parties to this action, which was ejectment, derived their titles respectively from John and William Menough; and Gibson, J., speaking for the supreme court of Pennsylvania, said: "The nature of the interest which the original

owners of the warrants held under their joint survey will go far to settle the rights of the parties before us. They were grantees from the State, not of an individual interest in the whole, but of separate and distinct parts of the whole; consequently they were not tenants in common. The grant to the one would not have entitled him to possession in common of the whole; nor if one had been disseised could he have recovered an undivided portion from the other. The truth is, the survey was im-
37 perfect; and although a valid appropriation of the land as to strangers, it left their rights, as between themselves, suspended till the subject of the grant to each should be specifically designated by the proper officer or by themselves.

"It has been held that any number of warrants may be surveyed together by a common outline, so as to prevent a valid appropriation of a part of the land included to subsequent warrants, and it being a matter between the warrantees themselves, I can see no difference whether the interior lines be laid down by protraction or not. But the separate owners of warrants thus laid would certainly not have an interest in common in the lands included in the general survey. Tenants in common, although their estates be several, have each an undivided interest in the whole; but it can, with no propriety, be said that each has an interest in the whole under a grant of a part."

And with equal propriety it might be said as to the railroad company, that it is a grantee from the Government, not of an interest in the
38 whole tract, eighty miles in width along the line of the road, but of separate and distinct parts of the whole; that the grant to the company did not entitle it to possession in common of the whole; that if it had been disseised, it could not have recovered an undivided portion from the Government of the lands reserved; that the grant to the company of the alternate odd sections, and the reservation to the Government of the even sections, left their rights, as between themselves, suspended till the subject of the grant to each should be specifically designated; that these separate owners of separate sections do not have an undivided interest in common in the whole tract; and that the company acquired no interest in the whole of the grant of a part.

This is not at all a conflict with the opinion of the Supreme Court of the United States, delivered by Justice Field, in the case of Frasher vs. O'Connor (115 U. S. 107), so much relied upon by appellant. In that case the court says: "A very great portion of the lands in that State
(California) were covered by Mexican or Spanish grants. Some of
39 the grants were by specific boundaries, and the extent of the land covered by them could be readily ascertained without an official survey. But by far the greater number were of a specific quantity of land lying within outboundaries embracing a much larger quantity. Thus grants of one or two leagues would often describe the quantity as being within boundaries embracing double or treble that amount, the grant declaring that the quantity was to be surveyed off by officers of the vicinage and the surplus reserved for the use of the nation. The grantee in such case was of course entitled only to the specific quantity named, but what portion of the general tract should be set apart to him could only be determined by a survey under the authority of the Government. Until then the grantee and the Government were tenants in common of

the whole tract. No one could intrude upon any portion of it, the whole being exempted from the pre-emption laws. The practical effect of this condition, in many cases, was to leave the grantee, until the official
40 survey, in the possession, use, and enjoyment of a tract of land containing a much larger quantity than that granted."

The sense in which the grantee and the Government are, in this decision, said to be tenants in common is that the separate share of each had not been set off. There is no intimation that the grantee of a part thereby acquires undivided interest in the whole, or that the share of each might have been ascertained by a partition. Tenants in common, though their estates be several, have an undivided interest in the whole, and can acquire no such interest by the grant of a part. In the case of the Mexican grant it required an act of Congress to compel the share of the grantee to be surveyed and designated, which would have been wholly unnecessary and useless if the Government and the grantee had been tenants in common. If they had been tenants in common, in a legal sense, no survey would have been necessary, for in that case they would each have owned
41 an undivided interest in the whole tract. Merely extending a survey over a tract held by tenants in common would not designate the shares of each. It would only ascertain and number the sections in which they had a joint, undivided interest. And the fact that a survey would ascertain and designate the acres or the sections that belong to the grantee and those that belong to the Government, and that the interests, when so ascertained, are several, and not joint, is conclusive that property so held and owned does not cause its owners to become tenants in common. Section six requires the Government to cause the lands granted to the company to be surveyed as they shall be required in the construction of the road. The force of this requirement is not affected by the act of July 15, 1870 (16 St. at Large, 310), which provides that, before any land granted to the company shall be conveyed to any party entitled thereto, there shall be first paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the company or party in interest.

This merely provides that before the lands shall be conveyed by the
42 company to any party the company shall pay the costs of survey, &c. But this does not do away with the duty of the Government to cause the lands to be surveyed. They must be surveyed before they can be sold or conveyed. It is the plain duty of the Government to cause these lands to be surveyed; and then, under the act of 1870, to prohibit any sales or conveyances by the company or the issuance of any patents to it, until it has paid the costs of such survey. If the lands had been surveyed, as required by section six, then no question could have arisen between the Government and the company as to the ownership of trees and timber upon the lands included within the boundaries of the grant. And the Government can not make its failure to perform this duty the foundation of an action against the company, which a survey, in accordance with the requirements of section six, would have rendered impossible. The construction of the road required this survey, thereby, if for no other reason,
43 to have rendered such an action as this or kindred actions unnecessary and impossible. It required a survey, to the end that the rights of the Government and the company be clearly defined and properly

understood. It required a survey, that the pre-emption and homestead laws might be applied to the alternate even sections along the line of the road, and to enable the Government to sell such sections. This survey, rendered necessary by the construction of the road, was not required, simply for the benefit of the company, but also for the benefit, advantage, and protection of the Government and its property. When the survey shall take place is not within the discretion of the company. The construction of the road, and as fast as it is constructed, puts this provision of section six in motion and requires the survey to be made. It was not intended that if the land granted to the company was not required in the construction of the road it should never be surveyed.

Now, if these parties could be held to an accounting, each being
44 the owner in severalty of parts of the unsurveyed lands, but which parts had not been designated, and neither having an undivided interest in the whole tract, how could a just and true account be stated and the parties correctly charged for trees and timber taken from such lands? It would be utterly impossible to ascertain from whose lands they were taken. The very first enquiry would be whether the trees and timber had been taken from the lands of the company or from that belonging to the Government? The fact that these parties own their shares or parts in severalty, and that they have no undivided interest in the entire tract, would suggest this enquiry at the outset, but the question could not be answered by anything short of a survey and designation of the sections. Suppose an accounting should be decreed and the company made to pay for one half the trees, and timber taken from the unsurveyed lands described, and then when these lands came to be surveyed and the sections
45 designated, and it should be found that the company had taken trees and timber only from its own sections? We do not think an accounting would be proper, when the damage and injury liable to be occasioned thereby would require another action or an act of Congress to remedy it. On the contrary, if it should be shown that all the trees and timber in question had been taken from the sections belonging to the Government, then under this action, wherein the Government only claims as a tenant in common, it could recover for only one-half the value of such trees and timber, and would loose the other half, and what it lost the company would gain.

A survey of the lands, which the Government ought to make, would show the exact rights of the parties, and then an accounting would be improper and unnecessary. And the Government can not lawfully demand an injunction until it can be shown that its property is being injured, or that injury is threatened, and this can not be shown until the
46 lands are surveyed and the sections designated. Then, actions in the nature of trespass or trover would be the remedy of the Government for trees taken or converted by the company.

The judgment is affirmed with costs.

DECIUS S. WADE, *Chief-Justice.*
J. H. MCLEARY, *Asso. Justice.*
THOS. C. BACH, *Asso. Justice.*

Filed & entered January 18th, 1887.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was entered in this cause in the words and figures following, to wit:

47 In the supreme court of Montana Territory, January term, 1887.

THE UNITED STATES, PLAINTIFF & APPELLANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, DEFENDANT & RESPONDENT.

Judgment on appeal.

Be it remembered that in the present term of January, in the year of our Lord one thousand eight hundred and eighty-seven, the above-entitled action was brought into this supreme court by virtue of an appeal from the order and judgment therein of the court below, entered on the 4th day of June, A. D. 1886, sustaining defendant's demurrer to plaintiff's amended complaint in said cause, and filing herein a transcript of the record of the court below in said cause. And whereas, on the eleventh day of January of said term, the said cause came on to be heard before the court on the said transcript of record, and was argued by counsel for the respective parties. And on the eighteenth day of January, 1887, still of said term, said cause came on for the decision and judgment of

48 the court on appeal; whereupon, on consideration, it is now here ordered, adjudged, and decreed by this court, that the order and judgment of the court below 'staining defendant's demurrer to plaintiff's complaint, entered as aforesaid, be, and the same hereby is, affirmed with costs. And it is hereby further ordered and adjudged by this court that said defendant and respondent, The Northern Pacific Railroad Company, recover against said plaintiff and appellant, The United States, dollars for its costs herein expended.

18 January, A. D. 1887.

And, on the 27th day of January, A. D. 1887, the said plaintiff and appellant, by Robt. B. Smith, esq., its attorney of record, filed herein its notice of appeal to the Supreme Court of the United States from the order and judgment in affirmance as aforesaid herein mentioned, of which said notice of appeal, with the endorsement of service of same, the following is a copy, to wit:

49 In the supreme court of Montana Territory, January term, A. D. 1887.

THE UNITED STATES, APPELLANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, respondent.

Notice of appeal.

To The Northern Pacific Railroad Company, respondent in the above-entitled cause, and to Messrs. W. F. Sanders, E. W. Toole, W. W. Dixon, & Thomas L. Napton, attorneys for said respondent and defendant, The Northern Pacific Railroad Company.

You and each of you are hereby notified that the appellants in the above-entitled action, The United States, appeals from the judgment and decision

of the supreme court of Montana Territory, rendered in the above cause on January 18, 1887, sustaining and affirming the judgment of the lower court, and which judgment and decision of the supreme court is in favor of the respondent, The Northern Pacific Railroad Company, and is against the United States, and from the whole of said judgment this appeal
50 is prosecuted to the Supreme Court of the United States.

This January 21st, 1887.

ROBERT B. SMITH,
United States Attorney for Montana Territory.

Endorsement: Service of a copy of the above notice of appeal accepted this January 21st, A. D. 1887.

W. F. SANDERS,
Att'y for Respondent.

Filed Jan'y 27, 1887.

I. R. ALDEN, *Clerk.*

And on the said day, to wit, the 27th day of January, 1887, said plaintiff and appellant, The United States, by R. B. Smith, esq., its attorney, filed herein its præcipe for a transcript of the record on appeal to the Supreme Court of the United States in said cause in the following terms, viz:

51 In the supreme court of the Territory of Montana. January term, A. D. 1887.

THE UNITED STATES, APPELLANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, respondent.

Praecipe.

The clerk of the supreme court will please prepare, as soon as possible, and forward to me a transcript on appeal to the Supreme Court of the United States; and in said transcript will copy and include the following papers, to wit: The amended complaint, demurrer thereto, order of the lower court and the judgment of the lower court, the notice of appeal from the lower court, orders of the supreme court assigning and setting the case for trial, the hearing and submission in the supreme court and the opinion and judgment of the supreme court, and the notice of appeal to the Supreme Court of the United States, with the indorsement of acceptance of a copy of such notice by the attorneys and a copy of this praecipe.

Very respectfully,

ROBT. B. SMITH,
U. S. Attorney.

Filed Jan'y 27, 1887.

I. R. ALDEN,
Clerk.

52 In the supreme court, Territory of Montana. January term, A. D. 1887.

THE UNITED STATES, APPELLANT,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, respondent.

I, Isaac R. Alden, clerk of the supreme court of Montana, do hereby certify the foregoing fifty-one pages, numbered from 1 to 51, inclusive, to contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the above-entitled action, as the same appear and remain on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of February, A. D. 1887.

[SEAL.] ISAAC R. ALDEN,
Clerk.

(Indorsement of cover:) No. 580. The United States, appellant, *vs.* The Northern Pacific Railroad Company. Montana Territory supreme court. Filed February 26, 1887.